No. 75-1899

Supreme Court, U. S.
FILED
DEC 10 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

HONORABLE EDWARD J. McMANUS, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4) is reported at 535 F. 2d 460. The orders of the United States District Court for the Northern District of Iowa (Pet. Apps. 1, 3) are unreported. The opinion of the United States District Court for the Central District of California (Pet. App. 2) is reported at 396 F. Supp. 314.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1976. A petition for rehearing and suggestion for rehearing *en banc* was denied on June 2, 1976 (Pet. App. 5). The petition for a writ of certiorari was filed on June 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in an obscenity case the "community standards" of the district in which the prosecution is commenced must be applied in a district to which the case is transferred and, if so, whether this should preclude the transfer of such a case.

2. Whether the court of appeals properly issued a writ of mandamus to correct the erroneous transfer.

STATEMENT

An indictment returned on July 11, 1974, in the Northern District of Iowa charged petitioners Robert Elkins, Howard K. Cohen, Stephen R. Ginsburg, Angelo M. Giudice and Daniel Goldblum, together with Richard J. Aronson, with mailing obscene material, transporting obscene material in interstate commerce, and conspiring to commit those offenses, in violation of 18 U.S.C. 1461, 1462, and 371. They moved to transfer the case to the United States District Court for the Central District of California, pursuant to Fed. R. Crim. P. 21(b). The government opposed the motion, arguing that, under *Miller* v. *California*, 413 U.S. 15, the local community standards of the community in which the materials were distributed should be applied at trial (Pet. App. 1, p. 2).

Petitioner McManus granted the motion, on the grounds that the defendants and most of the witnesses reside in California and that a trial in Iowa would be a hardship in light of financial, employment and health considerations (Pet. App. 1, pp. 1-2). The court held that the application of community standards of the district did not require a trial in that district, because a California jury could be instructed to apply Iowa community standards (Pet. App. 1, p. 3).

After the case was transferred to California, the prosecutor asked the judge there to enunciate the "community

standards" to be applied at trial. The judge held that Iowa standards would apply, and that they could not be proven solely by expert testimony (Pet. App. 2, pp. 2-3). He then dismissed the indictment *sua sponte*, reasoning (Pet. App. 2, p. 3):

> [A]n attempt by the Government to prove its case in this forum solely by expert testimony would not provide a proper basis on which the jury could determine the obscenity of the materials in the case at bar because of the special and integral part that the knowledge of a juror of the community from which he comes plays in deciding what conclusion the average person applying contemporary community standards would reach in a given case.

The court held that the prosecution's right to have the materials judged under the community standards of Iowa should not be defeated by a transfer to a jurisdiction in which the factfinder would not be able to apply Iowa standards (Pet. App. 2, p. 5). It concluded that because jurors must apply their own knowledge of the standards of the community in which they reside, jurors in California could not determine the community standards of Iowa.

The defendants were reindicted in Iowa on June 19, 1975.[1] They again moved for a transfer, and the motion was granted by petitioner McManus for the same reasons that he had granted the first motion to transfer (Pet. App. 3). Judge McManus also noted health considerations concerning petitioner Elkins and the fact that his presence in California was required on other criminal matters (Pet. App. 3, pp. 5-6). The court again concluded that an Iowa trial would cause more inconvenience

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[1]Richard J. Aronson, who was charged in the first indictment, was named as an unindicted co-conspirator in the second.

to the defendants than a California trial would cause to the prosecution (Pet. App. 3, p. 6). Judge McManus reiterated his belief that a California jury could apply Iowa community standards (Pet. App. 3, p. 6). Although Judge McManus acknowledged that the indictment had been dismissed in California after the first transfer, he wrote that a different judge in California might receive the second transfer and might not dismiss the indictment; in any event, he wrote, the government could appeal a second dismissal (Pet. App. 3, p. 7).

The United States, stymied by apparent inability to prosecute this case in either Iowa or California, petitioned for a writ of mandamus, which the court of appeals granted. It noted that Congress specifically permitted obscenity prosecutions in recipient districts, and that this Court has held that local rather than national standards must be used to judge obscenity (Pet. App. 4, pp. 7-9). The court concluded that the local community standards requirement, coupled with the prosecution's decision to bring the indictment in Iowa, required that the obscenity *vel non* of the materials be determined according to Iowa community standards. In light of the holding of the California district court that expert testimony would not enable a California jury to apply Iowa standards, the court of appeals held that the trial must be in Iowa.

DISCUSSION

The parties to this case, and all three lower courts that have passed upon it, have treated "community standards" as if they were defined by specific geographic limits, and as if one set rather than another of these standards were the "right" one to be applied to each case. The parties and courts have assumed that, if the case is tried in California, the factfinder must assess the materials under Iowa standards. That view, together

with Judge McManus's belief that the case should be tried in California, led to a position in which the case could not be tried at all.

The United States believes that the role of "community standards" in obscenity cases is not to define a specific, "right" set of standards by which to evaluate the materials in question. We submit, instead, that the correct position was stated in *United States* v. *Cutting*, 538 F. 2d 835 (C.A. 9) (*en banc*), petition for a writ of certiorari pending, No. 76-10. As the Ninth Circuit put it (538 F. 2d at 841):

> The purpose of the "community standards" instruction is not to distinguish attitudes in one area from those in another, but rather to distinguish personal or aberrant views from the generalized view of the community at large.
>
> This Court has disapproved "national standards" because no such standards are ascertainable or are known to jurors, not because the local standards of a particular community must be applied in every case, even when a search for such standards leads (as it did here) to prolonged litigation and considerable delay. The Court indicated in *Hamling* v. *United States*, 418 U.S. 87, 105-106, that the relevant community ordinarily would be the judicial district in which the trial took place. We do not believe that the community in which the offense occurred necessarily is the only possible one upon which to base "community standards" instructions if, for compelling reasons, the trial must be held elsewhere.

Whether this is the correct view of the role of "community standards" instructions may well be determined in *Marks* v. *United States*, No. 75-708, argued November 1 and 2, 1976. We contended in that case (Br. 41-45) that the primary role of the community standards in-

struction is to require the jurors to look to the community around them, rather than their own personal sensibilities, when determining whether material is patently offensive or appeals to the prurient interest.[2] If the Court should adopt that position, the foundation of the court of appeals' decision in the instant case—its assumption that a California jury would be required to apply Iowa standards—would be undermined, and it might be appropriate to remand this case for further consideration. We therefore believe that the Court should defer disposition of this case pending its decision in *Marks*.

In taking this position about the role of "community standards" in obscenity cases, we do not imply that the standards and values of the community in which sexually oriented materials are distributed are irrelevant. Far from it; 18 U.S.C. 1461 and 1462 were amended in 1958 in order to allow obscenity prosecutions to take place in the district where the materials were received. *United States* v. *Luros*, 243 F. Supp. 160, 176-177 (N.D. Iowa), reversed on other grounds, 389 F. 2d 200 (C.A. 8), certiorari denied, 382 U.S. 956; *United States* v. *West Coast News Co.*, 30 F.R.D. 13, 18-19 (W.D. Mich.). In amending the statutes, Congress made it plain that obscenity prosecutions ought to be conducted in the district in which the materials are received. S. Rep. No. 1839, 85th Cong., 2d Sess. 3 (1958); H.R. Rep. No. 1614, 85th Cong., 2d Sess. 7 (1958). Cf. *Miller* v. *California*, 413 U.S. 13, 32: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas

[2]We are furnishing to counsel for petitioner a copy of our brief in *Marks*.

or New York City." In ordinary criminal cases in which venue may be laid in more than one district, the prosecution's choice of venue is entitled to considerable deference;[3] in obscenity cases, because of the special interest of the district into which the materials are sent in preserving its own standards, the prosecution's choice of venue should be accepted in all but extraordinary circumstances.

Because a transfer of an obscenity case creates the risk of frustrating the ability of the district into which the materials were sent to enforce its own standards, there should be a heavy presumption against transfers, although they should not be precluded. The court of appeals in the instant case recognized the existence of such a presumption. The district court did also. But Judge McManus determined that the balance of inconvenience still required the prosecution to be held in California. We think that this was error, because it did not reflect sufficient deference to the receiving district's interests and was based upon the incorrect belief that a California jury could apply Iowa standards. Cf. *Hamling, supra*, 418 U.S. at 106.

The court of appeals therefore was justified in issuing a writ of mandamus to compel the trial to be held in Iowa.[4] The court did not rely primarily on such

[3]*Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 245-246; *United States* v. *National City Lines, Inc.*, 334 U.S. 573. Indeed, until the adoption of Fed. R. Crim. P. 21, criminal cases could not be transferred at all, no matter how great the inconvenience to the defendants. See the Notes of the Advisory Committee on Rules on the 1966 amendment to Rule 21(b), 18 U.S.C., p. 4500.

[4]Mandamus usually may not be used to correct simple errors by district courts. This case is unusual, however, because in the view of petitioner McManus the case must be prosecuted in California, and in the view of the district court in California

considerations, however, but instead founded its opinion on a view of the role of "community standards" instructions that we believe is unsound. We submit that this case should be tried in Iowa, but if compelling circumstances require its transfer elsewhere, the jury should be instructed to apply the "community standards" of the judicial district in which the trial is held.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of this Court's decision in *Marks* v. *United States, supra.*

Respectfully submitted.

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Solicitor General.

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DECEMBER 1976.

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the case must be prosecuted in Iowa. The issuance of a writ of mandamus therefore was necesary in order to ensure the right to prosecute the case at all. See *Will* v. *United States*, 389 U.S. 90, 97-98; *Ex parte United States*, 242 U.S. 27.

Petitioners' assertion (Pet. 20) that the United States engaged in appellate forum shopping by seeking mandamus in the Eighth Circuit, rather than by appealing the dismissal of the indictment in the Ninth Circuit, is unfounded. If, as we urge, an obscenity case ought not to be transferred from the district in which the prosecution was commenced, and if a jury in California should not apply Iowa standards, then the appropriate course of action was to seek appellate review of the propriety of the transfer, not the propriety of the dismissal of the indictment. A reversal by the Ninth Circuit of the California decision still would have left this case to be tried in California.